85-966

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1985

JON VERMOUTH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where drug sniffing dogs were used randomly without probable cause or even a reasonable suspicion, to examine and determine the contents of hundreds of storage lockers which are located on private property and are protected against public intrusion by an elaborate security system, did the Ninth Circuit err in construing this Court's decision in *United States v. Place*, 103 S.Ct. 2637 (1983), as exempting all dog searches in private places from Fourth Amendment protection and is the decision in the instant case in conflict with the Second Circuit interpretation of *Place* in *United States v. Thomas*, 757 F.2d 1359 (1985)?

2. Under this Court's decision in *Franks v. Delaware*, 438 U.S. 152 (1978), after a defendant has demonstrated that a search warrant contains critical misrepresentations, is there a constitutional right to an evidentiary hearing at which a defendant can present testimony and cross-examine prosecution witnesses who have filed counter-affidavits, where the trial court resolved factual disputes in the affidavits as to alleged *Franks* misrepresentations concerning the reliability of drug sniffing dogs by accepting the factual allegations in prosecution affidavits without considering live testimony or permitting the defense to cross-examine the affiants?

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No. _____

In the Supreme Court of the United States

October Term, 1985

JON VERMOUTH,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jon Vermouth, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The memorandum decision of the circuit court is set forth in the attached Appendix.

JURISDICTION

The opinion of the Court of Appeals was filed August 9, 1985, and a petition for rehearing was denied on October 22, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS

The Fourth and Fifth Amendments to the United States Constitution are set forth in the attached Appendix.

STATEMENT OF THE CASE

A. Proceedings Under Appeal

On April 14, 1983, Petitioner Jon Vermouth was arrested in Santa Barbara, California, by state law enforcement officers executing a state search warrant. On August 31, 1984, an eight count indictment was returned against co-defendants Jon Vermouth and Rosemary Loomis. On October 4, 1984, an eleven count First Superseding Indictment was filed and on December 7, 1984, a ten count Second Superseding Indictment was filed. The Second Superseding Indictment consisted of the following charges: (1) Count one charged conspiracy under 21 U.S.C. §846; (2) Counts two, three and four charged possession with intent to distribute under 21 U.S.C. §841(a)(1); (3) Count five charged use of telephone under 21 U.S.C. §843(b); (4) Counts six, seven, eight and nine charged travel in interstate commerce under 18 U.S.C. §1952; and (5) Count ten charged a continuing criminal enterprise violation under 21 U.S.C. §848.

The trial of Vermouth and Loomis commenced on January 24, 1984. The jury convicted Vermouth on Counts 1,2,3,5,6,7,8 and 9 and on April 9, 1984, Vermouth was sentenced to 12 years in prison and a fine of $50,000. Vermouth's Excerpt of Record in the Ninth Circuit ("ER") at 17.

B. Searches at Issue

This case involves a complex series of interrelated searches, three of which are immediately relevant to this

Petition. The first occurred on April 12, 1983, when members of the Santa Barbara County Sheriff's Office and U.S. Customs Office and their marijuana sniffing dogs made a random sweep of The Storage Place, a high-security facility housing hundreds of self-storage units. Based upon the agents' interpretations of the dogs' reactions, warrants were issued by a state magistrate for several storage lockers, including #285 which was rented by Petitioner Jon Vermouth. The search turned up approximately 50 pounds of cocaine and other evidence introduced at trial. Based upon the actions of the dogs and what was found in locker #285, a warrant was procured for 822 North Voluntario Street in Santa Barbara where the second search by the agents and another drug detection dog was conducted; thousands of documents and five more pounds of cocaine were sezied and both defendants were arrested.

The search of The Storage Place was made pursuant to an investigation by the Santa Barbara Sheriff's Office of burglary break-ins at storage sheds approximately thirty miles from The Storage Place (where no burglaries had occurred). On April 11, 1983, without any reasonable suspicion, the sheriff's office arranged to have U.S. Customs dogs trained in the detection of narcotics to search The Storage Place, which is a facility leasing storage lockers of various sizes to persons who desire to have a safe, secure place to store items for which there is no room at their home or office. Vermouth's Opening Brief in the Ninth Circuit at 9 (cited as "V.O.B.") The Storage Place is a high security facility[1] located

[1]The facility is surrounded by a wire fence which is topped with four separate strands of barbed wire. The entry gate is locked at all times and access is limited by a pushbutton combination lock. Each time that entry is made, a record of the entry prints out on a tape. Additionally, an 8mm film record of each car entering

in Carpenteria, California, some 15 miles south of Santa Barbara. *Id.*

On April 12, 1983, after closing hours, U.S. Customs agents and their dogs were allowed on the premises. Because the dogs had engaged in search activities earlier that day and there were severe wind conditions at the time of the search,[2] the parties are in serious disagreement as to the effect of any fatigue, thirst or wind conditions on the dogs' ability to detect contraband. *Id.* at 9-10.[3] The defense submitted declarations by the two managers of The Storage Place who were present during the search and witnessed the facts that the dogs were fatigued and that it was extremely windy that evening. *Id.* at 10 & n.4. On the evening of the search, the agents were asked whether the dogs could smell anything in the wind. One agent replied that, "I don't know. We have never done anything like this in this kind of condition." *Id.* at 10. High winds disperse odors, making it harder for dogs to pinpoint the location of the odors and causing numerous false alerts. *Id.*

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the premises is made. After business hours the facility is patrolled by four guard dogs inside the fence and one outside. Unlike some other storage businesses, The Storage Place is only open during normal business hours and even customers cannot enter after hours. V.O.B. at 9.

[2]The wind in the general area was blowing between 20 and 23 miles an hour. There may have been gusts of even higher velocity and the wind conditions were made more severe by the configuration of the storage lockers. E.R. at 140, 158.

[3]The declarations of the defense dog expert supplied an explanation of how the individual and cumulative effects of wind, cold weather and fatigue were such that he concluded the dogs should not have been worked at that time and that no qualified dog handler could responsibly vouch for the accuracy of the dogs. E.R. at 163-64. The expert estimated that after four to five hours of work, fatigue will cause dogs to lose 25 to 50 percent of their accuracy, and that cold and windy conditions would reduce accuracy between 30 and 50 percent. *Id.*

According to defense declarations disputed by the prosecution, each of the dogs was given a test run with a "bait bag" of marijuana which was next to the door in locker #200. Defense declarations, including that of Fred Nunes (one of the managers), stated that after several attempts both dogs did not alert to this contraband. *Id.* Finally, a dog handler virtually forced one of the dog's nose against the area in which the marijuana had been secreted and after a short period of time, the dog then alerted. *Id.*

Despite these adverse conditions, the dogs were sent randomly searching up and down the rows of storage lockers. The ensuing search was plagued by false alerts by the dogs, the only dispute among the parties being how many false alerts. In theory, if there were contraband in a locker both dogs would alert at the location. The prosecution conceded that there were four lockers as to which one dog alerted while the other did not, *id.* at 11, although the defense contended that such false alerts occurred at as many as 13 or 14 lockers. *Id.* Ultimately, the officers obtained only five search warrants for five lockers even though both dogs had alerted to ten lockers. *Id.*

The five search warrants were obtained by means of affidavits which were false and misleading. All of the information regarding the inaccuracies of the two dogs Dutch and Ali, was intentionally or recklessly omitted from the affidavit including the following facts: (1) the dogs were exhausted; (2) they had never worked under such severe wind conditions; (3) the actual wind conditions at the time of the search were severe; (4) their own handlers knew the dogs could not be accurate under those conditions; (5) when testing the dogs minutes before the random search under similar but better conditions and working with known marijuana, neither

dog performed accurately or reliably; and (6) no competent dog handler would rely on the accuracy of the dogs' responses under the facts involved in this case.

The reliability of the dogs became an issue by virtue of statements in the affidavit regarding the dogs' history for accuracy, including the representation that one dog, Ali, had never made a mistake in sniffing out controlled substances. V.O.B. at 12. In fact, his accuracy rate by Customs' own records was a dismal 38%. *Id.* While the affidavit states that every time he did not alert, no contraband was found, few if any such checks were actually made. While the affidavit states that when Ali alerted, drugs were always found, the defense contended that even under ideal conditions, Ali's accuracy was no more than 38% and the other dog, Dutch, was accurate no more than 68% of the time. *Id.* at 12.[4]

Of the five warrants, only one brought any significant results. Inside Vermouth's storage locker, the officers found an immobile Mercedes Benz. After an hour of strenuous effort, the trunk was pried open and the police found two large blue footlockers containing 50 pounds of cocaine.

C. Statement of Proceedings

Petitioner's suppression motion requested an evidentiary hearing on the numerous factual issues raised by the supporting declarations and offers of proof. The defense claimed *inter alia* that the search warrant affidavits for The Storage Place contained material intentional and/or reckless misrepresentations and omissions and that the random exploration of all the

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[4]The affidavit led the magistrate to believe that the dogs' accuracy was increased by the fact that both dogs alerted. In reality, accuracy is decreased whenever Ali confirms an alert because he is wrong in his alerts more than he is correct. E.R. at 146.

lockers at The Storage Place constituted an illegal search conducted without probable cause or even an articulable suspicion. With respect to The Storage Place, the defense pleadings set out a series of false statements and omissions. These intentional inaccuracies created the false impression that highly trained, unerringly reliable dogs had detected contraband when, in fact, the dogs were in poor condition, had repeatedly failed to perform properly minutes before the bait bag and were quite fallible even under ideal conditions.

The trial court denied the suppression motion without conducting an evidentiary hearing on the *Franks v. Delaware* challenge to the search of locker #285. In denying Petitioner's request for an evidentiary hearing on the *Franks* issues, the trial court remarked that the Petitioner had not made an adequate preliminary showing that the law enforcement authorities had practiced "fraud" on the magistrate. R.T., Dec. 28, 1983, at 71.[5] In reaching this conclusion, the district court chose to adopt virtually all of the prosecution's factual contentions and to reject the contentions set out in the defense declarations. V.O.B. at 21-24. The defendant's request to cross-examine affiants was denied. V.O.B. at 22-23. The trial court also upheld the initial sniffing expedition at The Storage Place, construing *United States v. Place*, 103 S.Ct. 2637 (1983) as placing all dog searches outside of Fourth Amendment protection.

The Ninth Circuit affirmed the trial court and adopted an approach similar to that of the lower court in deciding the two questions presented in this Petition. The major point of divergence is that unlike the trial court, the panel held that Petitioner Vermouth had a legitimate expectation of privacy in locker #285. Appendix at A3-

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[5]The abbreviation "R.T." refers to the Reporter's Transcript.

A4. However, the Ninth Circuit adopted the district court's view that *Place* permits warrantless dog searches of private places without probable cause or even an articulable suspicion. *Id.* at A17. Further, the appellate court, while applying a *de novo* standard of review, chose to accept the version of the conflicting facts set out in the prosecution's declarations of the facts rather than focusing on whether the defense had set out factual issues to be resolved at an evidentiary hearing. *Id.* at A5.

I.

A RANDOM AND EXPLORATORY SWEEP BY DRUG DETECTION DOGS IN PRIVATE AREAS CAN CONSTITUTE A SEARCH FOR FOURTH AMENDMENT PURPOSES UNDER THIS COURT'S DECISION IN *UNITED STATES v. PLACE*

At trial and on appeal, Petitioner vigorously contended that the Fourth Amendment was violated by the use of drug sniffing dogs, without probable cause or even a reasonable suspicion, to conduct a random exploratory search of hundreds of lockers in a high-security storage locker facility. *See* note 1, *supra*. This Petition seeks to have this Court resolve conflicting interpretations among the circuits of this Court's decision in *United States v. Place*, 103 S.Ct. 2637 (1983) which held that a dog sniff was not a "search" protected by the Fourth Amendment where the dogs were used in an airport luggage area open to the public. The *Place* decision contains language limiting the holding to the specific facts in *Place*, *id.* at 2644-45,[6] and Petitioner

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[6]The *Place* court limited its decision to "the particular course of investigation that the agents intended to pursue here – exposure of respondent's luggage, *which was located in a public place*, to

is aware of no published caselaw or sound policy reason which would justify extending *Place* to private areas.

The Ninth Circuit decision in this case applied *Place* to private areas, contending that any difference between dog searches in private areas as opposed to public areas would be a "distinction without significance, . . ." Appendix at A17. In so holding, the panel has placed itself in conflict with the views of the Second and Fifth Circuits, *see, United States v. Thomas,* 757 F.2d 1359, 1366-67 (2d Cir. 1985); *Horton v. Goose Creek Independent School Dist.,* 690 F.2d 470, 476-77 (5th Cir. 1982) (requiring reasonable suspicion for search of school lockers) as well as the views expressed in a Ninth Circuit opinion in *United States v. DiCesare,* 765 F.2d 890 (9th Cir. 1985).

The Second Circuit decision in *United States v. Thomas,* 757 F.2d 1359 (2d Cir. 1985) is the major case concerning the application of *Place* to dog searches in private places. In *Thomas,* a search warrant for defendant Whelling's apartment was issued based on an affidavit's claim that a canine sniff outside Whelling's apartment indicated the presence of drugs inside. The defendant claimed that the canine sniff was an illegal search, a claim which the Second Circuit upheld. The court refused to regard *Place* as immunizing all dog searches from Fourth Amendment scrutiny: "It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation

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a trained canine . . ." *United States v. Place, supra,* 103 S.Ct. at 2644-45 (emphasis added). Quoting this language, the en banc decision of the Ninth Circuit in *United States v. Beale,* 736 F.2d 1289, 1291 (9th Cir. 1984) (en banc) recognized the limited nature of the *Place* decision.

of privacy." *Id.* at 1366. In the context of a canine examination of the exterior of an apartment, the Second Circuit concluded that the use of the dog intruded on a legitimate expectation of privacy and was therefore a search triggering Fourth Amendment protection:

> Thus, a practice that is not intrusive in a public airport may be intrusive when employed at a person's home. Although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, *see United States v. Place*, 103 S.Ct. at 2644, it remains a way of detecting the contents of a private, enclosed space. With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument. Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be "sensed" from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation.

Id. at 1366-67.

The ominous possibilities of extending *Place* to immunize random dog searches of private places from Fourth Amendment is explained by the concurring opinion of Judge Reinhardt in *United States v. DiCesare*, 765 F.2d 890 (9th Cir. 1985), which involved a dog search

in a private apartment. The concurring opinion placed particular emphasis on the use of dogs in a private residence as a factor invalidating the dog search of the apartment. The opinion expressed the concern that the right of privacy and the Fourth Amendment protection against unreasonable searches were seriously infringed by bringing dogs to examine private residences without probable cause and the consent of the resident. *Id.* at 902-03. Limiting *Place* to public areas, the *DiCesare* concurrence commented that if dog searches of private places are held immune from Fourth Amendment protections, "it will be argued tomorrow that it is equally lawful for them to sniff and bite our clothes, beds, chairs, cradles, or whatever other possessions we keep in our homes." *Id.* at 901. Like the *DiCesare* concurring opinion, Petitioner is concerned that the unrestricted use of dogs to indiscriminately examine personal possessions in non-public places will result in a wholesale loss of privacy. If this Court sanctions the use of dogs to search hundreds of storage lockers in a high-security area without probable cause or reasonable suspicion, it is not unreasonable to expect that prosecutors will come before this Court tomorrow with the argument that after obtaining permission from the landlord dogs can run down the halls of security apartment buildings examining the doors of all of the residential units.

Aside from the fact that dogs were used in a private, high-security area in the instant case, a pivotal factor triggering Fourth Amendment protection is that dogs were used in an indiscriminate dragnet sweep of hundreds of lockers. This Court has long expressed its abhorrence of unfocused, generalized, information-seeking searches of the type involved in this case. *See, e.g., Ybarra v. Illinois*, 444 U.S. 85 (1979) (mass investigatory detention,

interrogation and search of bar patrons);[7] *Davis v. Mississippi*, 394 U.S. 721 (1969) (mass detention of black men filling general description of perpetrator of crime).[8] Petitioner respectfully submits that an indiscriminate dragnet search does not lose its objectionable quality merely because a dog is used.

II.

THE DISTRICT COURT'S REFUSAL TO CONDUCT AN EVIDENTIARY HEARING UNDER *FRANKS v. DELAWARE*, IN VIOLATION OF DUE PROCESS AND THE FOURTH AMENDMENT, CANNOT BE JUSTIFIED BY ADOPTING THE ALLEGATIONS IN PROSECUTION PLEADINGS AS TRUE RATHER THAN FOCUSING ON WHETHER APPELLANT'S SHOWING WAS SUFFICIENT TO RAISE FACTUAL ISSUES TO BE RESOLVED AT A *FRANKS* HEARING

Both the trial court and the Ninth Circuit denied Petitioner an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), by eliminating the defense right to cross-examine the individuals who signed the

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[7] *Ybarra* commented that each patron in the tavern was "clothed" with an individualized constitutional protection against unreasonable search and seizure and that the search warrant gave officers "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." *Ybarra v. Illinois*, *supra*, 444 U.S. at 92-93.

[8] In *Davis*, the Court rejected the state's theory that indiscriminate "investigatory" searches and seizures should be immune from Fourth Amendment protection:

> But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers

prosecution declarations and accepting as true the conflicting factual allegations in prosecution declarations while rejecting the factual account set out in the defense declarations of dog experts and the managers of The Storage Place who witnessed the adverse wind conditions and the fatigue which destroyed the reliability of the dogs. Under this procedure, the prosecution can eliminate a hearing on all *Franks* challenges by submitting blanket denials of defense allegations in the hope that the district court and the appeals court conducting a de novo review will accept these allegations as the truth without considering live testimony to test the veracity of prosecution allegations.

It must be emphasized that the issue is *not* whether Petitioner's factual showing of falsehoods in the search warrant affidavit for locker #285 justified suppression but whether this showing justified the holding of an evidentiary hearing. *Franks* requires only a substantial preliminary showing "point[ing] out specifically the portion of the warrant affidavit that is claimed to be false." *Franks v. Delaware*, 438 U.S. 152, 171 (1978). Cases in the Ninth Circuit and other circuits have construed *Franks* to require only that the defendant submit an offer of proof establishing the existence of *Franks* issues and do not require courts to resolve factual disputes based solely on the parties' pleadings and without considering live testimony.[9] The defendant's

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> of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions."

Davis v. Mississippi, supra, 394 U.S. at 726-27.

[9]*See United States v. Rios*, 611 F.2d 1355, 1348 (10th Cir. 1979) (holding that hearing was required where defense offers of proof

pleadings must show that there are genuine factual issues concerning the existence of intentional or reckless falsities which would materially affect a finding of probable cause. *See* note 9. Under this standard, the defendant's offer of proof and declarations are the focal point of analysis in determining whether to conduct an evidentiary hearing; this hearing cannot be denied based on the trial court's decision to adopt a conflicting factual account set out in the prosecution's pleadings. *Id.* Under the trial court's procedure, the affiant who signed a false search warrant affidavit could submit a second affidavit saying the statements supporting the warrant were truthful and this would end any further inquiry.

The novel procedure adopted by the lower courts in this case of denying *Franks* hearings by resolving factual

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specified misrepresentations) *Cf. United States v. Bulgatz*, 693 F.2d 728, 732 (6th Cir. 1982) (defense allegations specifically alleged misrepresentations but denied hearing for lack of any allegation of materiality.) In *United States v. Chesher*, 678 F.2d 1353, 1360-64 (9th Cir. 1982), the Ninth Circuit reviewed the criteria a defendant must satisfy in order to obtain a *Franks* hearing. In *Chesher*, the court determined that a two prong test can be satisfied by a detailed offer of proof showing: (1) that the affidavit contained intentional or reckless falsities; and (2) that the challenged statement would materially affect a finding of probable cause. *Id.* at 1360. Even though portions of Chesher's offer of proof regarding the reckless and/or intentional nature of the misstatements were directly contradicted by the government, the court held that the offer of proof was more than sufficient:

> Clear proof is not required—for it is at the evidentiary hearing itself that the defendant, aided by live testimony and cross-examination, must prove actual recklessness or deliberate falsity.

United States v. Chesher, supra, 678 F.2d at 1362. *See also United States v. Davis*, 665 F.2d 830 (9th Cir. 1981) (the court reversed a trial court's denial of a *Franks* claim without an evidentiary hearing, adopting a standard requiring that the defense offer of proof set out "appropriate issues to develop on the merits in the evidentiary hearing").

conflicts in the prosecution's favor based solely on prosecution allegations in its affidavits, without considering live testimony or cross-examination, will destroy the Fourth Amendment protection against search warrants secured through falsehood. In addition, this procedure flouts the long-established principle of due process that "[o]ne of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony." *Holiday v. Johnston*, 313 U.S. 342, 352 (1941). Due process requires that all parties be afforded an opportunity to confront and cross-examine adverse witnesses when "important decisions turn on questions of fact." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). In these situations, confrontation and cross-examination of witnesses are essential elements of a meaningful hearing because cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). Hearings based only on affidavits are not an adequate substitute for evidentiary hearings with live testimony and cross-examination. *See generally Matthews v. Eldridge*, 424 U.S. 319, 345-45 (1976). Consequently, the courts have required evidentiary hearings on pretrial motions in criminal cases when those motions raise factual issues. *Cohen v. United States*, 378 F.2d 751, 761 (9th Cir. 1967) (noting that affidavits "are no substitute for competent proof when factual issues are properly raised"). *See also United States v. Green*, 670 F.2d 1148, 1154 (D.C. Cir. 1981) (due process requires cross-examination of witnesses at pretrial suppression hearings).

Conducting a *Franks* hearing with live testimony and cross-examination on material disputed factual issues superficially appears to be more time consuming than the procedure adopted by the lower courts in this case.

The trial court's resolution of factual disputes as to substantial *Franks* claims by choosing to adopt the prosecution's version of the f[illegible]y have saved some court time but is simply not an acceptable approach to resolving these disputes. Due process and the Fourth Amendment require that the existence of constitutional violations be determined by accurate means and not just the most expedient means.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF BARRY TARLOW

Attorneys for Petitioner
JON VERMOUTH

APPENDIX

UNITED STATES CONSTITUTION

AMENDMENT 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger: nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG - 9 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JON WAYNE VERMOUTH
Defendant-Appellant.

No. 84-5111
D.C. No. CR 83-731-DWW

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROSEMARY LOOMIS,
Defendant-Appellant.

No. 84-5167
D.C. No. CR 83-731-DWW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Honorable David W. Williams, District Judge, Presiding
Argued and submitted July 8, 1985 -
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Before: ANDERSON and TANG, Circuit Judges, and SOLOMON** District Judge.

Jon Vermouth and Rosemary Loomis appeal their convictions for various narcotics violations. Vermouth raises several challenges to the search of his storage locker, a Santa Barbara residence and Oregon cocaine lab. Loomis raises several challenges to the jury instructions and a variety of other challenges. The two were first tried together on a ten count indictment with Loomis named in three of the ten charges. Vermouth was convicted on eight of the ten counts, but Loomis was acquitted on one count and granted a mistrial on the other two counts charged against her. On retrial of the two counts, she was convicted on both. We affirm the convictions against both defendants.

I.

USA v. Jon Vermouth, No. 84-5111

The government argues that Vermouth lacked a legitimate expectation of privacy in locker 285 at the Storage Place and thus may not challenge the search of the locker on fourth amendment grounds. *Rakas v. Illinois,* 439 U.S. 129 (1978). Under *United States v. McConney,* 728 F.2d 1195, 1203 (9th Cir.), *cert. denied,* 105 S.Ct. 101 (1984), the district court's determination of this issue is reviewed *de novo.*

We conclude that the appellant's expectation of privacy in the locker itself is a legitimate one. Although the appellant used the locker with the apparent knowledge that the owner retained access to it, such knowledge does not necessarily lead to the conclusion

** Honorable Gus J. Solomon, Senior U.S. District Judge for the District of Oregon, sitting by designation.

that the appellant was leaving the locker exposed to the public or to governmental intrusion. *Katz v. United States*, 389 U.S. 347, 351 (1967)("what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.") By leasing the locker space under the terms of the agreement, the appellant maintained general control or supervision over how the space was to be used. Arrangements indicating joint control and supervision of the place searched may be sufficient to confer a reasonable expectation of privacy. *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984).

The expectation of privacy in the vehicle trunk and footlocker within it appears even more reasonable. Vermouth did not give the owner of the Storage Place the keys to the closed containers inside the locker. Consequently, he was able to exclude all others from access to these containers in the absence of a warrant. *See United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043 (1981). He had a right to challenge the search on fourth amendment grounds.

Vermouth contends that the district court erred by refusing him an evidentiary hearing (a *Franks* hearing) to explore his claim that the warrant affidavit contained intentional or reckless omissions. He argues that he made a sufficient offer of proof to trigger the necessity for such a hearing. The government argues that the offer of proof was insufficient. The standard of review is *de novo*. *United States v. Ritter*, 752 F.2d 435, 439 (9th Cir. 1985).

Under *Franks v. Delaware*, 438 U.S. 154 (1978), a defendant is entitled to a hearing to challenge the truthfulness of statements in a warrant affidavit under

certain circumstances. Bare allegations of bad faith are not sufficient to trigger this right to a hearing. *United States v. Chesher*, 678 F.2d 1353, 1360 (9th Cir. 1983). A two-part test must be satisfied to require a hearing. First, the defendant must make a "substantial preliminary showing" that the affidavit contained falsehoods that were intentional or reckless. Second, the alleged misstatements must be essential to the finding of probable cause. *Chesher*, 678 F.2d at 1360-62.

Vermouth's offer of proof focuses on omissions in the affidavit regarding the reliability of the dog searches which preceded the search of the locker. The defendant argues that declarations from the managers of the Storage Place suggested that one of the DEA agents questioned the dogs' reliability in windy conditions; that declarations by dog experts explained that windy conditions and fatigue can diminish the dogs' reliability; that the dogs allegedly failed to detect a bait bag of marijuana in locker 200 and finally, the affidavit failed to indicate that the dogs only had reliability rates of 38% and 68% in certain prior performance tests.

This offer of proof is insufficient to mandate a *Franks* hearing. The government offered counter-declarations of dog experts to show that the dogs had been extensively trained, had performed well in annual evaluations and monthly performance tests, and had the capacity to perform well in the weather conditions alleged to have existed the day the dogs were used. Moreover, the warrant to search was limited to lockers at which the detection dogs had both alerted. Overall, the defendant has not made a substantial showing that the alleged omissions in the warrant affidavit were intentional or reckless efforts to exaggerate the government's asserted basis for probable cause. The district court did not err in denying the appellant a *Franks* hearing.

The appellant next contends that a field test should have been held to determine the dogs' reliability. A district court's decision to admit or exclude evidence will be upheld unless it constitutes an abuse of discretion. *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984).

Both sides furnished declarations regarding the dogs' reliability. There was enough evidence before the court to determine whether reliance on the dogs was reasonable. In addition, a field test would have been elaborate and time consuming. The district court did not abuse its discretion.

The appellant next raises two challenges to the search of the Santa Barbara residence at 822 Voluntario. First, he argues that misstatements in the warrant affidavit required a *Franks* hearing. Second, he contends that the search warrant was not supported by probable cause.

On the *Franks* issue, Vermouth claims specifically that the affidavit failed to indicate that the Voluntario address on the rental agreement for locker 285 had been deleted in a rental renewal agreement. The district court, however, did not err by refusing to hold a formal hearing. The alleged omissions do not constitute a substantial preliminary showing of reckless falsity sufficient to require a *Franks* hearing. Nor are they essential to a finding of probable cause because the authorities had reasons to link Vermouth to the residence independent of the locker registration card.

Additionally, the evidence relied upon to show probable cause is sufficient to indicate in "a practical, commonsense" manner that there was "a fair probability" that contraband or other evidence of a crime would be found at the Voluntario residence. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Under *de novo* review,

McConney, 728 F.2d at 1203, the district court did not err in concluding that probable cause existed to justify a warrant to search the residence.

Vermouth next challenges the district court's admission of evidence seized from the residence at 520 Brimstone Gulch Road in Wolfcreek, Oregon based on the conclusion that Vermouth lacked a legitimate privacy expectation in the Oregon residence. He also contends that the court erred in its additional conclusion that an insufficient preliminary showing was made to require a *Franks* hearing to determine whether intentional or reckless falsehoods were included in the warrant affidavit.

The district court relied on the absence of a proprietary interest in the Oregon residence. This court, however, has looked beyond indications of ownership and possession to address the standing issue. *United States v. Nadler*, 698 F.2d at 999. Other factors relevant to this inquiry are whether the defendant had the power to exclude others. *Id.* at 999, whether he has stored belongings in the premises searched, *United States v. Salvador*, 740 F.2d 752, 755 n.2 (9th Cir. 1984), and whether he stayed overnight on the premises. *Id.* In addition, a co-conspirator with joint control over the premises searched may have a reasonable expectation of privacy in the area. *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984).

Here, the defendant possessed a key to the premises and claims to have stored belongings there. As a cocaine lab was discovered at the residence, one can reasonably conclude that those individuals with keys to the house sought to limit entry to people involved in the operation.

The government relies on Vermouth's arrest a week before the search of the Oregon residence to show that

he had abandoned the Oregon residence. Although abandonment can divest an individual of a fourth amendment interest in the abandoned property, *United States v. Burnette*, 698 F.2d 1083, 1047 (9th Cir. 1983), *cert. denied*, 103 S.Ct. 2106 (1983), abandonment must be voluntary. *Id.* (citing *United States v. Kendall*, 655 F.2d 199, 200 (9th Cir.), *cert. denied*, 455 U.S. 941 (1981). The government cannot use Vermouth's arrest to prove voluntary abandonment. We find that Vermouth had a legitimate expectation of privacy in the Oregon residence.

We conclude that the district court did not err by denying a *Franks* hearing. The declaration of the officer reaffirmed that he had smelled what he thought was P2P, brought out a chemist for an expert opinion (unsuccessfully due to windy conditions), and possessed no reason to lie because at the time the warrant was sought, he knew that the defendants had been arrested on cocaine charges rather than amphetamine charges in California. Moreover, the affidavit stated that surveillance had spotted Vermouth at the residence which may have provided a basis for probable cause independent of the officer's detection of the odor.

Vermouth next claims that the court's admonition to the lawyers outside the presence of the jury that they were not to suggest that a unanimous verdict was unnecessary constituted an undue restriction on the defense lawyer's closing argument. Additionally, Vermouth challenges the court's instruction which allegedly coerced a unanimous guilty verdict. The standard of review is abuse of discretion. *United States v. McDonald*, 576 F.2d 1350, 1358 (9th Cir.), *cert. denied*, 439 U.S. 830 & 927 (1978).

We find that the court's conduct did not amount to an abuse of discretion. The comments did not exceed

"the permissible encouragement of the jurors to pursue their deliberations toward a verdict, if possible, in order to avoid the expense and delay of a new trial. The jury was neither coerced nor directed toward any verdict." *United States v. Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976), *cert. denied*, 434 U.S. 819 (1977) (supplemental instruction to jury that it had duty to find facts based only on evidence presented not error). See also *United States v. Bermudez*, 526 F.2d 89 (2d Cir. 1975).

Finally, Vermouth raises a challenge under Fed. R. Crim P. 32(c)(3)(D). He challenges alleged inaccuracies in the presentence report regarding the amount of cocaine that had been seized from him and information concerning a state drug conviction.

The trial court did not err because it was not required to apply Rule 32(c)(3)(D) in this situation. The rule requires the court to make the presentence report available to the defendant and counsel before sentencing. 32(c)(3)(A). That requirement was met. The requirements of 32(c)(3)(D) contemplate challenges *prior* to sentencing. See Advisory Committee Notes. ("[Rule 32(c)(3)(D)] requires the sentencing court, as to each matter controverted, either to make a finding as to the accuracy of the challenged factual proposition or to determine that no reliance *will be* placed on that proposition at the time of sentencing.") (emphasis added). The challenges raised here, however, were made *after* sentencing had occurred on April 9.

Vermouth's conviction is AFFIRMED.

II.

United States v. Rosemary Loomis, No. 84-5167

Loomis first argues that there was an insufficient basis for the trial court's giving of the *Jewell* instruction. She contends there was no testimony to indicate that she had any awareness of Vermouth's involvement in drug dealing.

The *Jewell* instruction is proper "only when a defendant claims a lack of guilty knowledge and there are facts in evidence that support an inference of deliberate ignorance." *United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984)(citing *United States v. Henderson*, 721 F.2d 276, 277 (9th Cir. 1983). *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.)(en banc), *cert. denied*, 426 U.S. 951 (1976)("[D]eliberate ignorance and positive knowledge are equally culpable."). The instruction, however, should not be given merely because the defendant claims a lack of knowledge. *United States v. Garzon*, 688 F.2d 607, 709 (9th Cir. 1982). There must be facts indicating deliberate ignorance. *Id.* "[T]he cases in which the facts point to deliberate ignorance are comparatively rare, and they must be carefully distinguished from instances where the defendant was merely negligent." *McAllister*, 747 F.2d at 1275 (citing *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1325 (9th Cir. 1977)).

The only basis Loomis asserts for the impropriety of the *Jewell* instruction is that she never took the stand to testify as to a lack of knowledge about her boyfriend Vermouth's involvement with drugs. However, part of the defendant's case to avoid conspiratorial liability was to claim ignorance. The defense presented questions in cross-examination of witnesses in an effort to prove lack of knowledge. In argument, the defense suggested that

Vermouth was engaged in illegal conduct without informing Loomis of his dealings. Thus, the issue of conspiratorial knowledge was relevant.

As to evidence indicating conscious avoidance, the government produced evidence of cocaine bags on a kitchen countertop and a package of cocaine ready to be sent to an address found in Loomis' address book. The apartment contained several elaborate counter-surveillance devices, including a telephone scrambler and an electronic bug detector. Bundles of cash and evidence of other assets suggested personal wealth far in excess of the defendants' income. The evidence was sufficient to support an inference of deliberate ignorance of Vermouth's activities on the part of Loomis.

Loomis further contends, however, that the district court violated Fed.R.Crim.P. 30 by delaying the decision to give the instruction until after closing argument. She argues that this prejudiced her because her counsel did not have the opportunity to discuss *Jewell* concepts during closing argument.

Rule 30 requires the district court to "inform counsel of its proposed action upon the requests [for jury instructions] prior to their arguments to the jury." Here, the trial court explained to both lawyers its "proposed action upon the requests" with respect to the *Jewell* instruction. There was no objection to the employment of this procedure. *United States v. Abushi,* 682 F.2d 1289, 1303 (9th Cir. 1982). In argument, defense counsel elected to argue both that Loomis had no knowledge of her boyfriend's criminal activities and that even if she did, she did not join the conspiracy to distribute cocaine. He further argued that "mere presence" where the conspiracy was allegedly taking place is not enough to show participation in the conspiracy. Based upon this

argument, the trial court elected to give the *Jewell* instruction pursuant to its "proposed action" explained prior to argument. It did not violate Rule 30 by delaying the decision to read the *Jewell* instruction until after defense counsel's argument.

Defense counsel requested a lesser included charge of simple possession on the second count of the indictment which charged Loomis with possession with intent to distribute five and one-half pounds of cocaine. A defendant is entitled to a lesser included offense instruction if: (1) a lesser included offense is identified within the charged offense, and (2) a rational jury could find the defendant guilty of the lesser offense but not the greater one. *United States v. Johnson*, 637 F.2d 1224, 1233-34 (9th Cir. 1980).

Loomis claims that the jury could have concluded that the bulk of the cocaine found in the metal suitcase belonged to Vermouth while her possessory interest was limited to the cocaine found around the apartment. However, even limiting the amount supporting the charge in the second count of the indictment to the 37 grams of 90% pure cocaine found outside of the suitcase, it does not appear that a rational jury could find such possession was for personal use instead of distribution. See *United States v. Muniz*, 684 F.2d 634, 636 (9th Cir. 1982); *United States v. Johnson*, 734 F.2d 503, 506 (10th Cir. 1984)(possession of 26.6 grams of 82 percent pure cocaine could not rationally be limited to personal use). It was not error to refuse the lesser included instruction.

Loomis further contends that the district court committed plain error by failing to limit count two of the indictment to the cocaine found in the metal suitcase thereby excluding the cocaine found in the kitchen for consideration of the charge. However, such an

instruction was never requested and this court will not generally reverse a district court's failure to give a *sua sponte* limiting instruction. *United States v. Palmer*, 691 F.2d 921, 923 (9th Cir. 1982).

Loomis next contends that the district court erred when it inadvertently misstated a jury instruction by omitting a word during instruction on the conspiracy count. Despite ample opportunity to object to the proposed wording of the instructions, no such objection was registered. The test is for plain error.

This court cannot lightly reverse a conviction under the plain error standard. Plain errors must be "particularly egregious errors" which "seriously affect the fairness, integrity or public reputation of judicial proceedings," and we will reverse only to prevent "a miscarriage of justice." *United States v. Young*, 105 S.Ct. 1038, 1046-47 (1985) (citations omitted).

The adequacy of the instructions is determined by examining the instructions as a whole. *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984). The instructions must adequately inform the jury, *United States v. Harris*, 738 F.2d 1068, 1072 (9th Cir. 1984), and a trial judge has great latitude in crafting the instructions so long as they fairly and adequately cover the issues presented. *United States v. Marabelles*, 724 F.2d 1374, 1383 (9th Cir. 1984).

The instructions in their entirety dispelled any confusion which may have been created by the giving of the flawed instruction. After the flawed instruction, the court continued to emphasize that the alleged conspirator must act "with the intent to advance or further some object or purpose of the conspiracy" and "with understanding of the unlawful character of a plan" and must have "the purpose of furthering the under-

taking or scheme." The omitted word in part of the instructions was not plain error.

Loomis argues that there was little evidence to show active or direct participation in the conspiracy. Thus, she contends that the *Pinkerton* charge was plain error. *Pinkerton v. United States*, 328 U.S. 640, 648 (1946).

The district court did not commit plain error by giving the instruction. Loomis' apartment on Voluntario Street contained counter-surveillance devices, baggies of cocaine in large quantities and tax and financial records suggesting efforts to hide sources of major income. The government is not required to prove a direct agreement between alleged conspirators. *Abushi*, 682 F.2d at 1293. An agreement can be inferred from the acts of the parties. *Id.* Once the existence of a conspiracy is established, only a slight connection to the conspiracy is needed. *Id.* The evidence in this case was sufficient to justify the *Pinkerton* instruction.

Loomis next argues that her acquittal in the first trial on charges of possession with intent to distribute cocaine found in Locker 285 precludes the government from introducing evidence of the cocaine in Locker 285 in her second trial. In this case, Loomis' counsel expressly stated that he had no objection to the introduction of evidence relating to items found in Locker 285, including the footlockers in which 50 pounds of cocaine was found. The test is for plain error.

Here, the use of evidence from locker 285 does not constitute plain error. The government did not seek to prove Loomis' possession of the cocaine found in that locker. Rather, the admission of the cocaine was sought to show acts of conspiratorial involvement by alleged co-conspirator Jon Vermouth. "The law is clear that a defendant may be convicted of the substantive acts

of his coconspirators, as long as those acts are 'committed pursuant to and in furtherance of the conspiracy.' " *United States v. Reed*, 726 F.2d 570, 580 (9th Cir. 1984)(quoting *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979)). That Loomis may have participated in a conspiracy to help Vermouth distribute the 50 pounds of cocaine involved a separate issue outside the collateral estoppel bar.

Loomis next argues the district court abused its discretion by imposing sentence based partially on the court's alleged consideration of Loomis' insistence on trial despite the strength of the government's case against her. She argues this penalized her exercise of the right to trial.

The punishment imposed was three years and a $20,000 fine. The potential punishment was 30 years and $50,000. The district court has wide discretion in determining what sentence to impose and if the sentence is within statutory limits, the sentence is not generally subject to review. *United States v. Lopez-Gonzales*, 688 F.2d 1275, 1276 (9th Cir. 1982). However, discretion must be exercised, considering circumstances of the crime, mitigating and aggravating circumstances and an accurate evaluation of the particular offender. *Id.* at 1277.

Here, the district court expressly disclaimed any consideration of Loomis' exercise of the right to her second trial in determining sentence. Additionally, the sentence was well within the trial court's discretion.

Loomis next raises several claims of prosecutorial misconduct: an allegedly improper reference to the failure of two witnesses to testify, allegedly misleading testimony of a tax expert called by the government, and asserted misstatements during the government's closing

argument. The claim of misconduct with respect to the allegedly improper reference to a witness' failure to testify does not justify reversal. It is well established that "[a] prosecutor may properly comment upon a defendant's failure to present witnesses so long as it is not phrased as to call attention to defendant's own failure to testify." *United States v. Fleishman*, 684 F.2d 1329, 1343 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982). The other claimed errors, in the context of the entire record and trial, *Young*, 105 S.Ct. at 1045-47, do not amount to plain error.

Loomis next argues there was no evidence linking her to five and one-half pounds of cocaine. We find that sufficient evidence existed for the conviction for possession with intent to distribute the five and one-half pounds of cocaine in the metal suitcase. The essential basis on which Loomis argues no relationship to the suitcase is a lack of ownership. However, the involvement with Vermouth, the presence of the suitcase containing cocaine in the livingroom, the bundles of cash stashed through the apartment and the baggies of cocaine lying around the kitchen provide ample evidence of possession. Drawing evidentiary inferences in a light most favorable to the government, a rational jury could find beyond a reasonable doubt that Loomis possessed the cocaine found in the suitcase. *United States v. Ramirez*, 710 F.2d 535, 548-49 (9th Cir. 1983).

Loomis next contends that there was no necessity for an expert witness and thus no foundation for admitting the testimony of the government's expert to show Loomis was concealing sources of income in preparing her tax return.

This argument is meritless. Expert testimony is admissible if the jury may receive "appreciable help from it." *United States v. Solomon*, 753 F.2d 1522, 1525 (9th

Cir. 1985). The decision to admit such testimony rests with the broad discretion of the trial judge and should not be disturbed unless manifestly erroneous. *Fleishman*, 684 F.2d at 1335. Here, the relationship between certain omissions or statements on a return and an effort to conceal sources of income is not necessarily an area in which expert testimony would not be helpful. There was no abuse of discretion.

Loomis next contends that the owner could not consent to the manner in which the government used detection dogs to examine the lockers at the Storage Place, eventually leading to a search of locker 285. Her argument is essentially that the scope of the owner's consent to search the Storage Place was exceeded. Lommis, however, has no standing to assert the fourth amendment rights of the owner.

With respect to locker 285 itself, Loomis alleges no facts to indicate that she maintained a reasonable expectation of privacy in that locker. Even if she did, the use of dogs to sniff the lockers was not a "search" triggering fourth amendment protection. *United States v. Place*, 103 S. Ct. 2637 (1983); *Unitd States v. Beale*, 736 F.2d 1289 (9th Cir. 1984) (en banc). Loomis argues that *Place* and *Beale* address dog sniffing in public areas like airports and should not be extended to cover less public areas like the Storage Place. This is a distinction without significance, however, because the focus of the privacy inquiry is on the specific area sought to be retained as private and the degree of intrusiveness into that allegedly protected area. *Place*, 103 S. Ct. at 2644 (privacy interest in luggage).

Loomis also challenges the district court's refusal to allow discovery of the training manual for detection dogs. Without it, she argues, the *Franks* challenge to the dogs' reliabiity was impaired.

The district court has wide discretion in ruling on discovery requests in criminal cases. *United States v. Maynard*, 458 F.2d 247, 248 (9th Cir. 1973); *United States v. Watson*, 669 F.2d 1374, 1384 (11th Cir. 1982). In this case, the trial court had evidence of the dogs' performance on tests and declarations from experts on canine behavior when determining the propriety of a *Franks* hearing. It is questionable whether the Customs manual on detection dog training would have added much to the defendant's case for a *Franks* hearing.

In addition, Loomis still must demonstrate a reasonable expectation of privacy in locker 285 to make any challenges with respect to the *Franks* issue. United States v. Pollock, 726 F.2d 1456, 1465 (9th Cir. 1984). The *Franks* right to an evidentiary hearing to challenge a warrant affidavit stems from the fourth amendment right to challenge unreasonable searches. Absent some demonstration of a protectible interest, Loomis has no standing to raise this challenge to the district court's denial of the discovery request.

Loomis finally argues that the California Constitution was violated when authorities obtained her address through her unlisted phone number from the phone company without a warrant. *People v. Chapman*, 36 Cal.3d 98 (1984). However, the California Supreme Court has held recently that the California constitution authorizes suppression no more than the federal constitution due to the State's passage of Proposition 8. *In re Lance W.*, ___ Cal.3d ___, 210 Cal.Rptr. 631, 646 (1985) ("[A] defendant may seek suppression of evidence obtained in a search or seizure that violates 'state constitutional standards,' [but] a court may exclude the evidence on that basis only if exclusion is also mandated by the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amend-

ment."). Absent a fourth amendment challenge to the invasion of some reasonable privacy interest, the appellant has no claim for suppression of address information obtained from the phone company.

Loomis' conviction is AFFIRMED.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 4, 1985, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Brian Sun
U.S. Department of Justice
Central District
312 North Spring Street
Los Angeles, California 90012

Solicitor General
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 4, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

Supreme Court, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-965 and 85-966

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROSEMARY LOOMIS, PETITIONER

v.

UNITED STATES OF AMERICA

JON VERMOUTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a dog sniff of petitioner Vermouth's rental storage locker violated petitioners' Fourth Amendment rights (both petitioners).

2. Whether the district court improperly failed to conduct an evidentiary hearing on petitioners' claim that a search warrant application contained material misstatements and omissions (both petitioners).

3. Whether the district court violated the requirements of Fed. R. Crim. P. 30 by delaying a final decision upon whether to give a jury instruction concerning deliberate ignorance until after defense counsel's closing argument (petitioner Loomis only).

4. Whether, under the facts of this case, the district court properly gave an instruction that conscious avoidance of the truth can constitute proof of the element of guilty knowledge (petitioner Loomis only).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A20) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1985. Petitions for rehearing were denied on October 22, 1985. The petitions for a writ of certiorari were filed on December 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the appendix to the petition filed in No. 85-965.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner Vermouth was convicted on one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; two counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); one count of using a telephone to facilitate the commission of a felony, in violation of 21 U.S.C. 843; and four counts of interstate travel to facilitate narcotics trafficking, in violation of 18 U.S.C. 1952.[2] He was sentenced to concurrent terms of 12 years' imprisonment on the conspiracy and possession counts, four years' imprisonment on the telephone facilitation count, and five years' imprisonment on the interstate travel counts. He also was sentenced to a three-year special parole term and ordered to pay a total of $50,000 in fines.

Following a jury retrial[3] in the same district, petitioner Loomis was convicted of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. 846, and of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841 (a)(1). She was sentenced to concurrent three-year terms of imprisonment and ordered to pay a $20,000 fine. The court of appeals affirmed both convictions.

1. During early 1983, Santa Barbara County, California, police conducting an investigation of burglaries of several storage warehouse facilities concluded that the burglars

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[2]The district court dismissed one possession count, and the jury was unable to reach a verdict on one count alleging the conduct of a continuing criminal enterprise.

[3]Petitioner Loomis was initially tried jointly with petitioner Vermouth and acquitted on one cocaine possession count. The jury in that case, however, was unable to reach a verdict on the conspiracy count and on another possession count.

were likely seeking to obtain narcotics stored at the facilities. To further their investigation, the officers obtained permission from the proprietor of one of the facilities to run narcotics detecting dogs through the warehouse. Petitioner Vermouth had rented storage locker No. 285 in the facility. Pursuant to the rental contract, Vermouth had agreed not to store contraband on the premises and to permit the owner of the warehouse, who retained pass keys for all units, to remove such items (E.R. 21-24).[4]

On April 12, 1983, investigators arrived at the facility with two narcotics detection dogs, "Ali" and "Dutch." After both dogs were given a "warm-up" exercise requiring them to find a bag of marijuana that the officers had hidden, each was separately walked through the locker area. The dogs alerted to a total of nine lockers. Both alerted to the same five lockers, one of which was locker No. 285. E.R. 29-31. The officers then applied for warrants authorizing searches of the lockers to which both dogs had alerted. The search warrant application for Vermouth's locker related how both dogs had alerted to it independently, as well as the dogs' qualifications and training in locating drugs. In particular, the application averred that Dutch had been used on numerous occasions to locate contraband and that the validity of the animal's alerts had been accepted by numerous state and federal courts. As to Ali, the application averred that, in prior cases, no narcotics were found when the dog did not alert, but that "in the cases he did alert, there were narcotics found" (E.R. 174).

After receiving a warrant from a local judge, a search of locker No. 285 revealed the presence of two footlockers containing approximately 50 pounds of high quality cocaine, bags containing cocaine residue, testing devices for

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[4]"E.R." and "Supp. E.R." refer to the excerpt of record and supplemental excerpt of record in the court of appeals in the *Vermouth* case.

cocaine, and paperwork bearing the names of both petitioners (E.R. 35). Evidence found in the locker, as well as other evidence the officers gathered, led the officers to believe that still more evidence of drug trafficking could be obtained at 822 North Voluntario Street, Santa Barbara, California, a small apartment occupied by Vermouth and petitioner Loomis, his girlfriend

The police executed a warrant to search this address on April 15, 1983. Upon entering the apartment, one of the officers observed Vermouth take a metal suitcase and place it in the bathroom. Loomis was observed lying in bed (Loomis Tr. 26-27). The ensuing search of the apartment resulted in the discovery of a 5-pound quantity of cocaine in the suitcase, smaller quantities of cocaine lying in open view in the kitchen, a plastic bag of cocaine in a filing cabinet used by both petitioners, and passports showing that both petitioners had travelled to Colombia, a major source country for cocaine, during 1980 (Loomis Tr. 37-40, 179, 184-186, 471-473). After the officers discovered that Loomis had rented a storage locker at a different facility, they obtained a warrant to search it and found that it contained instruments used to dilute cocaine as well as a device to test the substance (Loomis Tr. 252-254) (Pet. App. A12).

Prior to trial, both petitioners filed a motion to suppress the evidence found in locker No. 285. They claimed that the use of drug detecting dogs at the storage locker warehouse violated their Fourth Amendment rights and that the application submitted in support of the warrant to search Vermouth's locker contained material misstatements and omissions. To support the latter claim, petitioners submitted affidavits averring that, although the search warrant application stated that Ali had always proven reliable in the past in detecting drugs, the performance records of both animals reflected that they had a history of giving false alerts. In addition, petitioners contended that the animals' apparent

fatigue, cold and windy weather conditions on the day of the search, and their failure to alert to a sample amount of a controlled substance during a test run further decreased the reliability of their alerts on locker No. 285. Petitioners maintained that these factors had been intentionally omitted from the search warrant affidavit. E.R. 113-165.

In response, the government submitted the affidavit of the Customs Service official responsible for management of the detection dog program in the Service's Pacific Region. The official stated that the only proper basis for evaluating the performance records of drug detecting dogs is the Service's annual performance evaluation and that those evaluations reflected that both dogs performed with a high degree of accuracy. Petitioners' statistical data to the contrary were derived from monthly utilization reports that had no bearing whatsoever on the dogs' proven reliability. The official also stated that neither wind conditions nor the animals' prior utilization on the day in question would have affected the accuracy of their alerts, because winds enhance odors, both animals were accustomed to working outdoors, and neither was tired upon arriving at the storage facility. Supp. E.R. 191-205.

The district court denied the motions to suppress the evidence found in locker No. 285. The court first found that neither petitioner had a reasonable expectation of privacy in the storage locker because the lease that Vermouth signed permitted the proprietor to enter and remove contraband (E.R. 49). In any event, the court ruled that petitioners were not entitled to an evidentiary hearing regarding the alleged inaccuracies in the affidavit because of their failure to make the " 'substantial preliminary showing' " required by *Franks* v. *Delaware*, 438 U.S. 154 (1978) (E.R. 50). In particular, the court found that the controverted statements concerning Ali's proven track record were made in good faith, and that, in any event, even if misstatements had been

intentionally made with respect to Ali's record, they were immaterial because Dutch, who was not the subject of any claims of misrepresentation, also alerted to locker No. 285 (E.R. 51-53). With respect to the allegation that the affidavit contained material omissions concerning the dogs' inability to work outdoors during windy weather conditions or when fatigued, the court held that petitioners "failed to make a substantial preliminary showing that the dogs' reliability was adversely affected by the factors they claim existed and that the affiant intentionally or recklessly failed to include any material information in his affidavit" (E.R. 54). Instead, the court found that, because air currents and outside temperatures that are colder than the temperature within a container actually enhance odors, the omitted material would have served to further establish probable cause (E.R. 54-55).

2. Although Loomis did not testify in her own behalf, she sought to demonstrate through cross-examination of government witnesses that she was unaware of Vermouth's drug trafficking activities (Pet. App. A11-A12; see *e.g.*, Tr. 264-265, 314, 520-522). In light of this line of defense, the government proposed that the court instruct the jury, as permitted by *United States* v. *Jewell,* 532 F.2d 697 (9th Cir.) (en banc), cert denied, 426 U.S. 951 (1976), that an inference of guilty knowledge may be established by evidence of conscious avoidance of the truth. Without objection from the defense, the court stated that it would give the instruction. At the close of the trial, however, defense counsel objected to the instruction, claiming that petitioner had not "affirmatively * * * stated that she was unaware of certain acts or certain evidence that came into the case" (Loomis Tr. 630). In response, the district court stated that it was "going to mark [the proposed instruction] with a question mark and see what comes out in argument from

especially the defendant's side, and then * * * make a decision whether it is appropriate to give it" (*ibid.*). Loomis's counsel did not object to this proposed course of action and proceeded to argue in summation that Vermouth was engaged in illegal conduct without Loomis's knowledge of his dealings (Loomis Tr. 658-682). Following this argument, the district court stated that it thought that it "must give the *Jewell* instruction because of the nature of the argument of the defendant having to do with a suggestion that she had no knowledge of any of the incriminating evidence" (Loomis Tr. 682). The district court therefore gave the instruction despite petitioner's objection (Loomis Tr. 682).

3. The court of appeals affirmed both convictions (Pet. App. A3-A20). In particular, the court held that the district court properly denied an evidentiary hearing on the question whether the search warrant affidavit contained material misstatements concerning the detecting dogs' capabilities, because petitioner Vermouth failed to show that the alleged omissions in the document were intentional or reckless efforts to exaggerate the basis for probable cause and because, in any event, any misstatements concerning the capabilities of one of the dogs were inconsequential because both animals had alerted to the locker (*id.* at A6). Relying upon *United States* v. *Place*, 462 U.S. 696 (1983), the court of appeals also rejected the argument that the dog sniff of the locker area was a search triggering Fourth Amendment protections (Pet. App. A18). Addressing Loomis's claim that the evidence did not warrant a *Jewell* instruction because she did not personally testify as to her lack of knowledge of Vermouth's unlawful activities, the court of appeals held that defense counsel's questions on cross-examination and his argument were sufficient to raise the issue of deliberate ignorance (Pet. App. A11-A12). Finally, the court rejected Loomis's claim that the trial judge violated Fed. R. Crim. P. 30 by delaying the decision to give the

Jewell instruction until after closing argument. The court of appeals held that the district court sufficiently delineated its proposed action to the parties prior to argument to comply with the requirements of the rule. Pet. App. A12-A13.

ARGUMENT

1. Petitioners contend (85-966 Pet. 8-12; 85-965 Pet. i-ii & n.i) that the use of sniffing dogs to detect the odor of controlled substances emanating from Vermouth's rented storage locker violated their Fourth Amendment privacy interests. Preliminarily, as the court below observed (Pet. App. A18), we note that petitioner Loomis has never alleged any facts to indicate that she maintained a reasonable expectation of privacy in the locker. She therefore cannot challenge the propriety of the procedure on Fourth Amendment grounds. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978).[5] In any event, the claim is without merit as to both petitioners and was correctly rejected by the court of appeals.

In *United States* v. *Place*, 462 U.S. 696 (1983), the Court held that a canine sniff of luggage at an airport does not constitute a search within the meaning of the Fourth Amendment. As the Court explained (*id.* at 707):

> A "canine sniff" by a well-trained narcotics detection dog * * * does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the

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[5]Although the court of appeals did hold that petitioner Vermouth had a legitimate expectation of privacy in locker No. 285 (Pet. App. A4), we question the correctness of that ruling in light of Vermouth's agreement to give the owner of the facility access to remove contraband. But there is no need to pursue this issue, because, for the reasons discussed in text, the dog sniff was not a "search" within the meaning of the Fourth Amendment.

> luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, thesniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

Thereafter, in *United States* v. *Jacobsen,* 466 U.S. 109, 123-124 (1984), the Court reiterated that a canine sniff test is not a search within the meaning of the Fourth Amendment and explained that the reason why it does "not intrude upon any legitimate privacy interest [is] that the governmental conduct [can] reveal nothing about noncontraband items." *Id.* at 124 n.24. See also *United States* v. *Beale,* 736 F.2d 1289 (9th Cir. 1984) (en banc), cert. denied, No. 84-404 (Dec. 3, 1984).

The court below therefore correctly concluded that, for purposes of the Fourth Amendment, it was inconsequential that the area subjected to the sniff test was in this case a storage locker facility (in which—apart from the locker itself—petitioner had no expectation of privacy) rather than a more public area such as an airport (Pet. App. A18). In either case, the technique does not infringe upon legitimate privacy interests, and it therefore does not constitute a search to which the protections of the Fourth Amendment apply.

As petitioners note, however (85-966 Pet. 8-9), the Second Circuit has expressed the view that *Place* does not always immunize the use of sniffing dogs from Fourth Amendment scrutiny. In the course of affirming convictions in *United States* v. *Thomas,* 757 F.2d 1359 (2d Cir.

1985), cert. denied, No. 84-1778 (Oct. 7, 1985), the court stated that the use of a sniffing dog outside the defendant's apartment to detect the presence of drugs inside constituted a search that, in the absence of a warrant, violated the Fourth Amendment. Distinguishing this Court's holding in *Place,* the court reasoned (757 F.2d at 1367 (citation omitted)):

> The Supreme Court in *Place* found only "that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment." * * * Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search.

Although we believe the Second Circuit's reasoning to be incorrect, the decision in *Thomas* and the holding of the court below have not resulted in a conflict among the circuits that requires resolution by this Court. In the first place, although *Thomas* was issued after this Court's decision in *Jacobsen,* the *Thomas* court made no reference to *Jacobsen* and failed to address the Court's explanation in that case that the reason the dog sniff in *Place* did not constitute a search was not merely because the dog was used in a public airport terminal, but because the technique did not intrude on any legitimate privacy interest in noncontraband items. *Jacobsen,* 466 U.S. at 124 & n.24. The Second Circuit should be accorded the opportunity to reconsider its reasoning in light of this Court's amplification in *Jacobsen* of the rationale underlying the Court's holding in *Place.*[6]

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[6]Because the *Thomas* court found that law enforcement officers acted in good faith reliance on a search warrant issued on the basis of the dog's alert, it refused to suppress evidence found in co-defendant Wheelings' apartment, citing *United States* v. *Leon,* No. 82-1771 (July 5, 1984),

But even ignoring the *Thomas* court's disregard of *Jacobsen, Thomas* creates no conflict with the decision of the court below, because the Second Circuit's decision was predicated upon one's "heightened expectation of privacy inside his dwelling," 757 F.2d at 1367, as compared to one's "much diminished" expectation of privacy in luggage in the custody of an air carrier at an airport (*id.* at 1366). The dog sniff in the instant case did not take place at the doorway of a private dwelling. Instead, the sniff was conducted at a warehouse, with the consent of the facility's proprietor, in a common area alongside the storage lockers. The tenants of those lockers had no privacy interest in that area and, indeed, a "much diminished" (*ibid.*) interest in the lockers themselves by virtue of their written agreements permitting entry by the proprietor for the purpose of removing contraband. Accordingly, even under the reasoning in *Thomas*, the dog sniff here would not have violated any legitimate privacy interests.[7]

2. Petitioners also claim (85-966 Pet. 12-16; 85-965 Pet. ii & n.ii) that the district court erred by failing to conduct an evidentiary hearing on their claim that the affidavit seeking

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and affirmed the conviction. Accordingly, the government did not seek further review of the case.

[7]Although the court of appeals rejected the government's argument that the terms of the rental agreement eliminated any reasonable expectation of privacy by petitioner Vermouth in locker No. 285, the court did acknowledge that the owner of the facility maintained access to it, thereby diminishing that expectation. Pet. App. A4-A5.

We also note that, contrary to petitioner Vermouth's contention (85-966 Pet. 9), the decision of the Fifth Circuit in *Horton* v. *Goose Creek Independent School District*, 690 F.2d 470 (1982), cert. denied, 463 U.S. 1207 (1983), does not conflict with the holding of the court of appeals. In that case, consistently with the decision of the court below, the court held that "the [dog] sniffs of the lockers and cars [of school students] did not constitute a search and therefore we need make no inquiry into the reasonableness of the sniffing of the lockers and automobiles." 690 F.2d at 477 (footnote omitted).

authorization to search Vermouth's locker contained misleading statements and omissions, and instead determining the issue on the basis of affidavits submitted by the parties. This fact-bound issue was resolved properly by the court below and does not warrant further review.[8]

As this Court explained in *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978) (footnote omitted), "[t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. * * * The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." Petitioners did not meet these requirements. Although petitioners' motions to suppress alleged that the affidavit misrepresented Ali's track record and omitted relevant data concerning both dogs' ability to detect contraband when fatigued and during adverse weather conditions, petitioners made no showing whatever that the affiant had intentionally or recklessly misrepresented Ali's qualifications, which the affiant had obtained from Ali's handler, or omitted other pertinent information in order to give an exaggerated impression of the animals' capabilities. See Pet. App. A6. In any event, the alleged inaccuracies concerning Ali's record are inconsequential. Here, as in *United States* v. *Spetz*, 721 F.2d 1457, 1464 (9th Cir. 1983),

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[8]We again note that petitioner Loomis's failure to demonstrate any privacy interest in Vermouth's storage locker precludes her from seeking suppression of the evidence obtained from the locker.

Dutch's independent alert on Vermouth's locker corroborated Ali's alert and made the claimed discrepancies immaterial. See Pet. App. A6.

3. Petitioner Loomis claims (85-965 Pet. 6-13) that the district court violated Fed. R. Crim. P. 30 by delaying a final determination whether to give an instruction concerning conscious avoidance of knowledge until after her attorney had completed his summation. In particular, she maintains that the procedure adopted by the district court improperly precluded defense counsel from anticipating and addressing the instruction during closing argument. The court below correctly concluded, however, that the procedure employed by the district court did not violate Rule 30.

Fed. R. Crim. P. 30 requires the district court to "inform counsel of its proposed action upon the requests [for jury instructions] prior to their arguments to the jury." "The rule's object [is] to fairly inform the trial lawyers so that they may intelligently argue to the jury." *United States* v. *Fusaro,* 708 F.2d 17, 22 (1st Cir.), cert. denied, 464 U.S. 1007 (1983). Here, prior to the summations, the district court made it clear that whether a conscious avoidance instruction would be given would depend upon whether defense counsel argued to the jury that Loomis was unaware of Vermouth's unlawful activities, and the defense neither interposed an objection nor sought further clarification as to this course of action. See Loomis Tr. 629-630. As the court below reasoned (Pet App. A12-A13), the district court therefore announced its "proposed action" (Fed. R. Crim. P. 30) in a manner that fully accorded petitioner's counsel the ability to anticipate such an instruction, given the argument that he presented, and to address it during the argument if he considered it necessary to do so.

4. Finally, petitioner Loomis claims (85-965 Pet. 13-16) that, under the circumstances of this case, it was improper for the district court to give a conscious avoidance instruction. More specifically, she maintains that the instruction was unwarranted because the only pertinent evidence tended to show that she possessed actual knowledge of Vermouth's activities and not that she deliberately avoided knowledge of what was occurring. This fact-bound claim does not merit review.

An instruction on conscious avoidance is proper "when a defendant claims a lack of guilty knowledge and there are facts in evidence that support an inference of deliberate ignorance." *United States* v. *McAllister,* 747 F.2d 1273, 1275 (9th Cir. 1984). The justification for the instruction is that "deliberate ignorance and positive knowledge are equally culpable * * * [and that] [t]o act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, 'positive' knowledge is not required." *United States* v. *Jewell,* 532 F.2d 697, 700 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976).

As the court below correctly concluded (Pet. App. A11-A12), petitioner herself, in an attempt to prove her lack of knowledge of Vermouth's drug distribution activities, injected evidence through her questions on cross-examination of government witnesses from which it could be inferred that, if she truly lacked knowledge, her ignorance had to be the product of conscious avoidance. In addition, evidence presented by the government, such as the presence in the apartment she shared with Vermouth of large quantities of cocaine, anti-surveillance devices, and large amounts of cash and other assets far in excess of petitioners' licit income, permitted the inference that, if Loomis was as

unaware of Vermouth's activities as she claimed to be, such ignorance was deliberately calculated to avoid learning the truth.[9]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[9]This case is distinguishable from other Ninth Circuit cases, *United States* v. *Beckett*, 724 F.2d 855 (~~Cir.~~ 1984), and *United States* v. *Garzon*, 688 F.2d 607 (~~Cir.~~ 1982), upon which Loomis relies to support her claim that evidence suggesting actual knowledge of unlawful activity does not justify a conscious avoidance instruction (85-965 Pet. 14 & n.13). In *Beckett*, the uncontradicted evidence was that the defendant acknowledged to an undercover FBI agent that a bag of cocaine his roommate was selling contained that substance. In contrast to this case, therefore, nothing in *Beckett* indicated "that the defendant tried to close his eyes or ears to what was happening." 724 F.2d at 856. In *Garzon*, although the defendant claimed at trial that he had no knowledge of a cocaine transaction conducted by his father in his presence, he admittedly opened the bag containing the cocaine. 688 F.2d at 609. There was thus no evidence from which a jury reasonably could conclude that he contrived to avoid learning of the deal. *Ibid.*